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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION This Document Relates To: *Hepting, et al. v. AT&T Corp., et al.*, No. C 06 0672 VRW	**No. M:06-cv-01791-VRW** **RESPONSE OF THE UNITED STATES TO *HEPTING* PLAINTIFFS' ADMINISTRATIVE MOTION FOR SCHEDULING ORDER** Courtroom: 6, 17th Floor Judge: Hon. Vaughn R. Walker

INTRODUCTION

Plaintiffs in the *Hepting* action have moved the Court to schedule a Case Management Conference ("CMC") that would focus primarily on issues specific to the *Hepting* case. *See Hepting* Plaintiffs' Administrative Motion for Scheduling Order (Dkt. No. 39). The United

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States' position is that the first order of business in any CMC should be to address case management issues that apply to this multidistrict litigation ("MDL") proceeding as a whole. The *Hepting* plaintiffs instead seek a conference that would focus largely on issues specific to their case. *See* Dkt. No. 39 at 2. But those issues were discussed at length with the Court at the *Hepting* status conference on August 8, 2006, and nothing has changed in the interim to warrant another conference on the same topics. In particular, the Court of Appeals has yet to rule on pending petitions for an interlocutory appeal of the Court's decision in *Hepting*, pursuant to 28 U.S.C. § 1292(b). Whether that appeal is taken will have a direct bearing on further proceedings in *Hepting* and, indeed, for this MDL proceeding.

Thus, as discussed further below, the United States proposes that the more efficient and orderly course would be for the Court to schedule a CMC after the Court of Appeals has decided whether to hear an appeal in *Hepting*. When that CMC occurs, we further propose that it should address initial management procedures that will govern all of the cases transferred to this MDL proceeding. Indeed, the Court's prior orders in this proceeding appear to contemplate an initial case management conference, and the issuance of a consolidated case management order, for *all* cases. *See* Orders at Dkt. Nos. 15 and 19 (related to "ALL CASES").

DISCUSSION

The point of MDL proceedings is to deal with numerous lawsuits in a manner that will promote their just and efficient resolution. But it is apparent from the *Hepting* plaintiffs' motion that they wish the Court to focus on matters specific to their own case, such as the filing of an Answer to the *Hepting* Complaint by the Defendants in that case, the specific discovery sought by the plaintiffs in that case, and the filing of a motion for a preliminary injunction in that case. *See Hepting* Motion (Dkt. No. 39) at 2. Indeed, the *Hepting* plaintiffs essentially propose to repeat the discussion of topics already addressed at the August 8, 2006, status conference in that case.

Since that status conference, however, the *Hepting* case has become one of more than thirty cases that have been transferred to this Court for consolidated and coordinated proceedings. As a result, the United States submits that the focus of any CMC should concern case management issues and procedures that will apply to and govern all of the cases, not just the *Hepting* case.

Indeed, the United States respectfully submits that, because any ruling by the Court of Appeals in the *Hepting* appeal would have a direct bearing on the similar claims presented in the transferred cases, the Court should defer holding a CMC until after the Court of Appeals decides whether it will take that appeal. At that time, the first issue that a CMC should address is whether to stay all MDL proceedings while the *Hepting* appeal is pending.

The next issue to discuss in a CMC for this MDL proceeding would be how the multiple cases will be coordinated. For example, the Court may wish to consider who among the many counsel for plaintiffs will be designated to represent the plaintiffs' interests in a coordinated fashion. Consideration should also be given at that time to the development of a unified master complaint, since most of the transferred actions involve highly similar and overlapping claims (and putative classes) concerning: (i) alleged surveillance by the National Security Agency ("NSA") of the content of communications under the acknowledged Terrorist Surveillance Program; and/or (ii) alleged NSA actions to collect telephone call record information from telecommunications carriers.

If the Court does wish to address issues specific to the *Hepting* case, the parties could do so at that same CMC. While the United States would address pending issues further in a case management statement, we reiterate for now our position, stated at the August 8 conference, that the issues identified by the *Hepting* plaintiffs should be deferred until a ruling on the *Hepting* 1292(b) petitions and pending any appeal, because the further proceedings proposed by the *Hepting* plaintiffs would undoubtedly implicate the state secret privilege issues that that United States has petitioned for review.

Finally, and as already noted, the United States submits that the Court should not schedule a CMC—whatever its scope—until after the Court of Appeals decides the pending 1292(b) petitions in *Hepting*, because whether the Court of Appeals will decide the issues presented by that appeal would obviously have a direct bearing on all the coordinated cases. In addition, the United States notes that proceedings before the Judicial Panel on Multidistrict Litigation ("JPML") are not concluded with respect to several cases. In particular, plaintiffs in three actions against the United States—*Center for Constitutional Rights v. Bush*, (06-cv-313) (S.D.N.Y.); *Al-Haramain Islamic Foundation v. Bush,* (06-cv-274) (D. Ore.); and *Shubert v. Bush,* (06-cv-2282) (E.D. N.Y.)—have moved to vacate a conditional transfer order that would consolidate those cases with this MDL proceeding. Briefing on those motions should be complete by late October, and we expect they will be heard by the JPML in late November 2006. JPML proceedings are also pending with respect to cases brought by the United States against various state government entities and telecommunications carriers that seek to enjoin those state entities from requiring the disclosure to them of information related to alleged NSA foreign intelligence activities. *See* Exh. A (conditional transfer order dated September 28, 2006, for additional actions). Unless all parties consent to the transfer of these additional cases, briefing on whether these cases should be transferred to this MDL proceeding should be complete by late November 2006.

CONCLUSION

For the foregoing reasons, the United States opposes the scheduling of a Case Management Conference that focuses on the specific issues raised by the *Hepting* case, but does not oppose a CMC that addresses case management issues and procedures applicable to all transferred cases. The United States respectfully proposes that this conference be set after a ruling on the 1292(b) petitions in the *Hepting* action.

Respectfully submitted,

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DATED: October 6, 2006

EXHIBIT "A"

JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

SEP 28 2006

FILED
CLERK'S OFFICE

DOCKET NO. 1791

BEFORE THE JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION

(SEE ATTACHED SCHEDULE)

CONDITIONAL TRANSFER ORDER (CTO-3)

On August 9, 2006, the Panel transferred 15 civil actions to the United States District Court for the Northern District of California for coordinated or consolidated pretrial proceedings pursuant to 28 U.S.C. § 1407. *See* ____F.Supp.2d____ (J.P.M.L. 2006). Since that time, 16 additional actions have been transferred to the Northern District of California. With the consent of that court, all such actions have been assigned to the Honorable Vaughn R. Walker.

It appears that the actions on this conditional transfer order involve questions of fact that are common to the actions previously transferred to the Northern District of California and assigned to Judge Walker.

Pursuant to Rule 7.4 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation, 199 F.R.D. 425, 435-36 (2001), these actions are transferred under 28 U.S.C. § 1407 to the Northern District of California for the reasons stated in the order of August 9, 2006, and, with the consent of that court, assigned to the Honorable Vaughn R. Walker.

This order does not become effective until it is filed in the Office of the Clerk of the United States District Court for the Northern District of California. The transmittal of this order to said Clerk shall be stayed 15 days from the entry thereof. If any party files a notice of opposition with the Clerk of the Panel within this 15-day period, the stay will be continued until further order of the Panel.

FOR THE PANEL:

Jeffery N. Lüthi
Clerk of the Panel

SCHEDULE CTO-3 - TAG-ALONG ACTIONS
DOCKET NO. 1791
IN RE NATIONAL SECURITY AGENCY TELECOMMUNICATIONS RECORDS LITIGATION

DIST. DIV. C.A.#	CASE CAPTION
CONNECTICUT	
CT 3 06-1405	United States of America v. Anthony J. Palermino, et al.
MAINE	
ME 1 06-97	United States of America v. Kurt Adams, et al.
MISSOURI EASTERN	
MOE 4 06-1132	United States of America v. Steve Gaw, et al.
MISSOURI WESTERN	
MOW 2 06-4177	Robert Clayton, et al. v. AT&T Communications of the Southwest, Inc., et al.
NEW JERSEY	
NJ 3 06-2683	United States of America v. Zulima V. Farber, et al.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **RESPONSE OF THE UNITED STATES TO *HEPTING* PLAINTIFFS' ADMINISTRATIVE MOTION FOR SCHEDULING ORDER (re: *Hepting,* 06-CV-676),** will be served by means of the Court's CM/ECF system, which will send notifications to ECF registered counsel, and I hereby certify that the foregoing response of the United States will be served by first class mail on the non-ECF participants listed on the attached pages.

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